Petition

81-1837

NO.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARTHUR FREEMAN, SR.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a trial court, in determining the admissibility of co-conspirators' hearsay statements under Rule 801(d)(2)(E) of the Federal Rules of Evidence should require "substantial independent" evidence of the conspiracy or whether the lower standard of a "fair preponderance" of the evidence is sufficient.

LIST OF PARTIES TO THIS PROCEEDING

The caption sets forth the parties to this proceeding. This matter was captioned in the Second Circuit as follows: United States of America v. Earl Widener, Arthur Freeman, Sr., Arthur Freeman, Jr., Juan Fernandez-Uriarte, Minor Andrews, Benjamin Rubinett, Harry Hugo Hickson.

TABLE OF CONTENTS

	Page
Question Presented For Review	i
List of Parties to this Proceeding	i
Table of Contents	iii
Table of Cases and Other Authorities	iv
Index to Appendix	v
Opinions of the Courts Below	2
Grounds Upon Which Jurisdiction of this Court is Invoked	2
Statement of the Case	2
Reasons why this Petition Should be Granted	4
POINT ONE— Certiorari Should be Granted in this Case Because of a Conflict Between the Decision by the Second Circuit and an Applicable Opinion by this Court and Such Conflict Should be Settled by this Court	5
POINT TWO— Certiorari Should be Granted in this Case Because of a Conflict Between the Decision by the Second Circuit and the Decisions of Other Federal Courts of Appeals on the Same Question	8

TABLE OF CASES AND OTHER AUTHORITIES

Page

Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) 8

United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969), cert. denied, 397 U.S. 1028, 90 S. Ct. 1276, 25 L.Ed. 2d 539 (1970) 6

United States v. James, 590 F.2d 575 (5th Cir.) cert. denied, 442 U.S. 917, 99 S. Ct. 2836, 61 L.Ed. 2d 283 (1979) 8

United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed. 2d 1039 (1974) 4

United States v. Oliva, 497 F.2d 130 (5th Cir. 1974) 9

United States v. Peacock. 654 F.2d 2339 (5th Cir. 1981) 9

United States v. Petersen, 611 F.2d 1313 (10th Cir. 1979) 10

United States v. Stanchich, 550 F.2d 1294 (2nd Cir. 1977) 6

United States v. Stipe, 653 F.2d 446, 449 (10th Cir. 1981) 9

OTHER AUTHORITIES

J. Weinstein & M. Berger, Weinstein's Evidence, United States Rules..... 7

STATUTORY PROVISION

Federal Rules of Evidence, Rule 801(d)(2)(E)..... 5

INDEX TO APPENDIX

1. Opinion of the United States Court of Appeals for the Second Circuit Affirming Conviction 1a

2. Excerpt from the Trial Transcript of the Eastern District of New York (R-388) 3a

3 Federal Rule of Evidence 801(d)(2)(E) 7a

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ARTHUR FREEMAN, SR.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Arthur Freeman, Sr., seeks a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit, which was rendered on January 6, 1982 and which affirmed the petitioner's criminal conviction. The Second Circuit dismissed, as being without merit, petitioner's contention that the statements of co-conspirators were inadmissible. This petition seeks to have this Court settle the conflict with this Court and among circuit courts, regarding the standards for admissibility of co-conspirators' statements.

OPINIONS OF THE COURTS BELOW

There was no formal opinion of the District Court. An excerpt from the transcript (R-388) in that court, including the judge's statement relating to the standard used to determine the threshold for admissibility of co-conspirators' statements, is set forth in Appendix "1".

The opinion of the Court of Appeals for the Second Circuit is not reported but is set forth in Appendix "2".

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court arises as follows:

1. The Judgment sought to be reviewed herein was entered by the United States Court of Appeals for the Second Circuit on January 6, 1982.

2. The statutory provision conferring jurisdiction on this Court is 28 U.S.C. 1254(1), which sets forth the review of a determination of a Court of Appeals by certiorari.

3a. Petitioner Arthur Freeman, Sr. filed a petition for a re-hearing in the United States Court of Appeals for the Second Circuit on January 22, 1982.

3b. Co-defendant Juan Fernandez-Uriarte filed a petition for a re-hearing in the United States Court of Appeals for the Second Circuit on February 2, 1982.

3c. On January 28, 1982, a mandate was issued as to appellants Widener, Hickson, Freeman, Jr., Rubinett and Andrews.

4. On March 15, 1982, petitioner Freeman, Sr. was denied re-hearing by the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

Petitioner Arthur Freeman, Sr. was indicted and charged with conspiracy to distribute and possess with in-

tent to distribute cocaine hydrochloride, which conspiracy lasted from February 3, 1981 through February 23, 1981, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846. Indicted as co-conspirators were Douglas Gannon and Richard Schubella, whose trials were severed, George Brenn whose trial was also severed, Earl Widener, Harry Hickson, Benjamin Rubinett, Juan Fernandez-Uriarte, Minor Andrews and Arthur Freeman, Jr.

Prior to trial, petitioner Arthur Freeman, Sr., along with Arthur Freeman, Jr., filed motions for a pre-trial hearing to determine the admissibility of co-conspirators hearsay against them, for transfer of the proceedings to the Southern District of Florida and for severance. Venue in the Eastern District of New York was challenged at trial. All motions were denied.

Trial by jury was commenced in the Eastern District of New York before Judge Jack B. Weinstein on May 27, 1981.

Judge Weinstein, applying the Second Circuit's standard for admissibility of co-conspirators' hearsay statements ruled as follows: "Based on what I heard I am now convinced by at least a preponderance, by evidence apart from hearsay, in accordance with *Geaney* and other Second Circuit cases, that the basic conspiracy existed from about the 7th of February. Others later joined it and may not have been parties to it at that time. So the purpose of my rulings on hearsay is that it's the same hearsay." (R-388).

Statements of co-conspirators were admitted into evidence which, petitioner Freeman, Sr. has contended, did not relate to him or to his participation in the conspiracy, petitioner not having appeared until February 23, 1981. Firstly, testimony regarding a query on February 3, 1981 by co-conspirator Gannon as to whether government agent Nelson wanted to buy fifty kilograms of cocaine and five tons of marijuana was admitted. Secondly, petitioner

has contended that testimony as to a meeting and discussions among co-defendants Gannon and Schubella and agents Nelson and Hanna on February 16, 1981, in Brooklyn, where defendant Schubella delivered samples of marijuana and impure cocaine were similarly inadmissible.

The jury found Arthur Freeman, Sr. guilty as charged on June 3, 1981. On July 1, 1981, Arthur Freeman, Sr. was sentenced to a term of six years imprisonment.

The United States Court of Appeals for the Second Circuit affirmed.

A petition for re-hearing was filed by the petitioner in the Second Circuit on January 22, 1982.

A petition for re-hearing was filed by the petitioner in the Second Circuit on January 22, 1982. This petition was denied on March 15, 1982.

REASONS WHY THIS PETITION SHOULD BE GRANTED

This petition should be granted because it presents a problem that falls within two of the three primary categories of this Court's Rule 17. Conflicting standards have existed in regard to the threshold for admissibility of co-conspirators' statements in a criminal trial since this Court's opinion in *United States v. Nixon.* This problem has not been resolved by the new Federal Rules of Evidence, adopted in 1975. This Court has recognized the dangers of admitting what would otherwise constitute inadmissible hearsay, especially in the context of a criminal conspiracy trial and should now resolve these conflicts in order that there be, in effect, a uniform standard of justice, as elaborated in Points I and II below.

POINT I

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE OF A CONFLICT BETWEEN THE DECISION BY THE SECOND CIRCUIT AND AN APPLICABLE OPINION BY THIS COURT AND SUCH CONFLICT SHOULD BE SETTLED BY THIS COURT.

Rule 17.1(c) of this Court indicates that one of the primary reasons for granting a writ of certiorari is when there is a conflict between a decision by a federal court of appeals and an applicable decision of this Court. Further, there is a basis for granting a writ where this question of federal law has not been, but should be, settled by this Court. The conflict in the case at bar concerns the admissibility of statements by co-conspirators under the Federal Rules of Evidence and the standard previously enunciated by this Court in *United States v. Nixon,* 418 U.S. 683, 94 S. Ct. 3090, 41 L.Ed. 2d 1039 (1974).

The Second Circuit, in the decision now under review, after ruling at length on other matters, held that "[a]ppellants' other claims are equally without merit," without further elaboration, thereby summarily dismissing the claim that co-conspirators' hearsay testimony was impermissibly admitted in the United States District Court for the Eastern District of New York.

It is conceded that under the Federal Rules of Evidence, Rule 801 (d)(2)(E) provides the basis for admitting into evidence "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy," where the statement is offered against a party. In such a situation the statement is specifically defined as not being hearsay. However, it is the very standard by which the courts determine that such a statement was

made "during the course and in furtherance of the conspiracy," that is questioned in this petition.

This Court, in *Nixon*, 418 U.S. at 701, 94 S. Ct. at 3104, 41 L.Ed. 2d at 1060 (1974) held that:

> Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence,[14] of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy.

As in many cases, a key point is made in the footnote, here, number fourteen (indicated above), wherein this Court elaborated on the requisite showing as to the conspiracy:

> As a preliminary matter, there must be substantial independent evidence of a conspiracy, at least enough to take the question to the jury. 418 U.S. at 701 n. 14

The Second Circuit had, both prior to *Nixon* and subsequent thereto, adhered to the standard of a "fair preponderance" of the evidence, independent of the hearsay statements, as the threshold which the prosecution must attain before co-conspirators' statements may be admitted into evidence against a defendant. *United States v. Geaney,* 417 F. 2d 1116, 1120 (2nd Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed. 2d 539 (1970); *U.S. v. Stanchich,* 550 F.2d 1294 (2nd Cir. 1977).

> [T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of hearsay utterances. *Geaney* at 1120.

This standard was applied in the case at bar in the Eastern District of New York, by Judge Weinstein: "Based on what I heard I am now convinced by at least a preponderance, by evidence apart from hearsay in accordance with *Geaney* and other Second Circuit cases, that the basic conspiracy existed from about the 7th of February . . . . " (R-388).

The Second Circuit rule has been criticized as "unsound" for, *inter alia,* setting "too low a standard" in relation to that set forth in *Nixon, supra.* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, UNITED STATES RULES S. 801(d)(2)(E)[01], at 801-150 (1977).

> The better practice would be to require a very high degree of proof before admitting the statement. Only if the court is itself convinced beyond a reasonable doubt—considering hearsay as well as non-hearsay evidence—of the conspiracy, defendant's membership and that the statement was made in furtherance thereof, should it admit.
>
> 1 J. WEINSTEIN & M. BERGER, *supra,* S. 104[05], at 104-44.

This deviation from this Court's standard in *Nixon,* is of great significance because of the danger inherent in admitting what would otherwise be inadmissible evidence, and this Court has made its concern perfectly clear long before *Nixon,* in *Glasser v. United States,* 315 U.S. 60, 74-75, 62 S. Ct. 457, 467, 86 L. Ed. 680, 701 (1942), in which this Court stated:

> [S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. . . . Otherwise hearsay would lift itself by its own bootstrap to the level of competent evidence.

Glasser v. United States, 315 U.S. 60, 74-75, 62 S. Ct. 457, 467, 86 L.Ed. 680, 701 (1942).

Consequently, it is essential that this Court determine whether the circuit courts should follow the standard enunciated by this Court in *Nixon.*

POINT II

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE OF A CONFLICT BETWEEN THE DECISION BY THE SECOND CIRCUIT AND THE DECISION OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME QUESTION.

Rule 17.1(a) of this Court provides another basis for granting a writ of certiorari where there is a conflict between decisions of two or more federal circuit courts of appeals.

In addition to being at variance with this Court, as set forth in Point One of this petition, the Second Circuit's "fair preponderance" of the evidence standard deviates from those circuits which adhere to the standard expressed in *United States v. Nixon* regarding the admission of co-conspirators' statements under the Federal Rules of Evidence.

The Fifth Circuit, in *United States v. James,* 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917, 99 S. Ct. 2836, 61 L.Ed. 2d 283 (1979) applies the "substantial independent evidence" standard as the threshold for admissibility of a co-conspirator's statement and reiterates the points made by this Court in *Nixon,* set forth in Point I of this petition. The Fifth Circuit also recognizes the concerns of "bootstrapping," voiced by this Court in *United States v. Glasser, supra.*

In adopting the "substantial independent evidence" criterion and in rejecting the Second Circuit's "fair preponderance" test, the Fifth Circuit recognizes that "[t]here is some confusion resulting from the use of the terms by the several courts of appeals to describe the quantum of proof necessary for the trial judge to admit a co-conspirator's statement. Some courts use the 'prima facie' standard; others refer to a 'fair preponderance' of the evidence. Still others require 'substantial independent evidence.' " *James* at 581.

The Second Circuit in *United States v. Stanchich, supra,* while reaffirming its "fair preponderance" standard set forth in *United States v. Geaney, supra,* did recognize that "the Fifth Circuit has adopted a standard more stringent than that in *Geaney,* namely, that a declaration of a co-conspirator may be admitted only if the independent evidence alone would support a jury finding of conspiracy." [citing *United States v. Oliva,* 497 F.2d 130 (5th Cir. 1974)] 550 F.2d at 1299 n. 4.

The Fifth Circuit has reaffirmed the formulation of *James* most recently in *United States v. Peacock,* 654 F.2d 2339 (5th Cir. 1981).

Additionally, the Tenth Circuit has adopted the Fifth Circuit's standard.

In *United States v. Stipe,* 653 F.2d 446, 449 (10th Cir. 1981) the court, having referred to the aforementioned principles of this Court in *Nixon* and *Glasser,* declared:

> The trial court recognized that this court adopted a higher standard based on the Federal Rules of Evidence. These rules allow a trial judge to ground his or her decision on hearsay, but it does not allow the use of the bootstrapping which was practiced prior to the adoption of the Rules.

Stipe advanced the "substantial independent evidence" standard in the Tenth Circuit. first recognized

there in *United States v. Petersen,* 611 F.2d 1313 (10th Cir. 1979).

Therefore, this Court should seek to resolve the conflict that now exists between the Second Circuit on the one hand and the Fifth and Tenth Circuits on the other, regarding the standard used to determine the threshold for admissibility of co-conspirators' hearsay statements.

CONCLUSION

A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE IN ALL RESPECTS GRANTED.

Dated: February 26, 1982

Respectfully submitted,

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Appendix

APPENDIX "1"

EXCERPT FROM THE TRIAL TRANSCRIPT OF THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

EARL WIDENER, HARRY HICKSON,
ARTHUR FREEMAN, BENJAMIN RUBINETT,
JUAN FERNANDEZ, MINOR ANDREWS,
ARTHUR FREEMAN, JR. and ROGELIO COBOS,

Defendants.

United States Courthouse
225 Cadman Plaza East
Brooklyn, New York

May 28, 1981
11:00 A.M.

BEFORE:
HONORABLE JACK B. WEINSTEIN,
CHIEF JUDGE

HARRY RAPAPORT
OFFICIAL COURT REPORTER

The Court: . . .

Based on what I heard I am now convinced by at least a preponderance, by evidence apart from hearsay, in accordance with Geaney and other Second Circuit cases, that the basic conspiracy existed from about the 7th of February. Others later joined it and may not have been parties to it at that time.

APPENDIX "2"
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING CONVICTION

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January, one thousand nine hundred and eighty-two.

Present:

Hon. Leonard P. Moore,
Hon. Irving R. Kaufman,
Hon. Ellsworth Van Graafeiland,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

v.

EARL WIDENER, ARTHUR FREEMAN, SR., ARTHUR FREEMAN, JR., JUAN FERNANDEZ-URIARTE, MINOR ANDREWS, BENJAMIN RUBINETT, HARRY HUGO HICKSON,

Appellants.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby are affirmed.

1. Appellants assert that Judge Weinstein erred in denying their motions for severance. The denial of a motion for severance is clearly within the discretion of the trial judge. *United States v. Turcotte,* 515 F.2d 145 (2d Cir.), *cert. denied sub nom. Gerry v. United States,* 423 U.S. 1032 (1975). We will rarely disturb his decision on review absent a showing of substantial prejudice. *See United States v. Stirling,* 571 F.2d 708 (2d Cir.), cert. denied, 439 U.S. 824 (1978). In addition, it is not enough for the appellants to show that they might have had a better chance of acquittal had they been tried alone. *United States v. Borrelli,* 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied,* 401 U.S. 946 (1971).

2. Where there is proof of the existence of a single conspiracy and of the appellants' involvement in that conspiracy, the trial court's refusal to sever is proper. *See United States v. Sperling,* 506 F.2d 1323, 1342 (2d Cir. 1974), *cert. denied sub nom. Golstein v. United States,* 420 U.S. 962 (1975). The record in the instant case amply demonstrates that each of the appellants was aware of the scope of this conspiracy and each played a role which was vital to the success of the venture. Fernandez-Uriarte was the ultimate supplier of the three kilograms of cocaine; the Freemans facilitated delivery to the buyers; Widener, with

the aid of Andrews and Hickson, orchestrated the entire transaction. Rubinett was to safeguard the profits from this venture. Furthermore, in light of the overwhelming evidence against each appellant, none has made the showing of substantial prejudice necessary to mandate severance. *See United States v. Ochs,* 595 F.2d 1247, 1260 (2d Cir.), *cert. denied,* 444 U.S. 955 (1979). Accordingly, Judge Weinstein properly denied their motions.

3. Appellants contend that venue in the Eastern District of New York was improper. Venue lies in the district where any overt act is committed in furtherance of the conspiracy by any co-conspirator. *See United States v. Panebianco,* 543 F.2d 447, 445 (2d Cir. 1976), *cert. denied sub nom. Anatala v. United States,* 429 U.S. 1103 (1977). The Government has the burden of proving venue by a preponderance of the evidence. *United States v. Leong,* 536 F.2d 993, 996 (2d Cir.), *cert. denied sub nom. Olsen v. United States,* 429 U.S. 924 (1976).

4. In the instant case, the Government's proof established that residents of Texas, Florida and New Jersey combined to sell cocaine to buyers they knew to be from New York. The negotiations leading up to the February 23, 1981 sale began on February 3, when Douglas Gannon called FBI agent Nelson in Queens to offer him cocaine and marijuana. The next day Nelson advised Gannon that his associates were interested in purchasing ten kilograms of cocaine. Pursuant to these conversations, agents Nelson and Hanna travelled to Florida to meet appellant Widener, Gannon's connection, and to sample the drugs. Widener was unable to produce a sample at that time and consequently arranged for a sample to be delivered to agent Nelson in New York. That sample was given to agent Nelson at a meeting at Bernie's Diner in Brooklyn. Clearly, this was an act in furtherance of the conspiracy to sell cocaine to buyers from New York. Accordingly, venue in the Eastern District was proper.

5. Appellants claim that if venue were proper in the Eastern District, Judge Weinstein should have granted their motions for transfer for the convenience of the parties. The decision to transfer rests in the discretion of the trial judge. *See United States v. Keuylian,* 602 F.2d 1033 (2d Cir. 1979).

6. When Judge Weinstein considered the motion to transfer the case to Florida, three defendants were residents of New Jersey, two were from Texas, and six were from Florida. Thus, there was no way to avoid inconveniencing some of the defendants at trial. Furthermore, although the arrests took place in Florida, the agent in charge of the case and the Government's key witnesses were from New York. The appellants did not call any witnesses on their behalf nor did they represent to the court that they intended to do so. In addition, although the drug sale took place in Florida, it was understood that the cocaine was to be distributed in the New York area. In light of these factors, Judge Weinstein did not abuse his discretion in refusing to transfer the case.

7. Appellants' other claims are equally without merit.

s/Leonard P. Moore,
LEONARD P. MOORE

s/Irving R. Kaufman
IRVING R. KAUFMAN

Ellsworth Van Graafeila
ELLSWORTH VAN GRAAFEILAND
Circuit Judges

APPENDIX "3"
FEDERAL RULE OF EVIDENCE
801(d)(2)(E)

RULE 801. DEFINITIONS

The following definitions apply under this article:

(d) STATEMENTS WHICH ARE NOT HEARSAY

A statement is not hearsay if—

(2) ADMISSION BY PARTY-OPPONENT.

The statement is offered against a party and is (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.